IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.2067 OF 2005

WITH

CIVIL APPLICATION NO.4667 OF 2005

M/s.Ajanta Tiles ..Appellant.

Vs.

The Regional Director,
Employees State Insurance
Corporation ..Respondent.

....

Mr.R.S.Pai for the Appellant.

Mr.H.V.Mehta for the Respondent.

....

CORAM : DR.D.Y.CHANDRACHUD, J.

15th December, 2005.

P.C. :

1. This Appeal arises out of an order dated 12th October, 2004 of the Employees' Insurance Court at Mumbai. The E.S.I. Authorities issued an

order dated 27th February, 1987 under Section 45-A of the Employees' State Insurance Act, 1948, seeking to recover an amount of Rs.55,844.55 towards alleged dues for the period August 1973 to July 1984 and January 1985 to December 1986. The Appellant carries on the business of manufacturing, fixing and polishing cement tiles. On occasion a purchaser of cement tiles may also request the Appellant to arrange for the fixing of tiles in which case, the Appellant suggests the name of a contractor. On these facts the question which arose before the E.S.I. authorities is as to whether the Appellant is liable to pay contribution in respect of the employees of the contractor. The expression 'employee' is defined in Section 2(9) of the E.S.I. Act as follows :

> "2(9) "employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and
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> (i) who is directly employed by the principal employer, on any work of,

incidental or preliminary to or connected with the work of, the factory establishment, whether such work done by the employee in the factory establishment or elsewhere; or

(ii) who is employed by or through an immediate employer, on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment;"

3. In the present case, the workmen concerned are admittedly workmen of the contractor. In the circumstances, Clause (i) which relates to workers who are directly employed by the principal employer has no application. Clause (ii), however, deals with a situation where workmen are employed by an immediate employer on the premises of the factory or establishment or under the supervision

of the principal employer or his agent on work which is ordinarily a part of the work of a factory of establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment. The witness who deposed on behalf of the Appellant specifically stated that the business of the company is the manufacture of cement tiles, so also of fixing and polishing those tiles. The witness also then stated in the course of his examination-in-chief that whenever any purchaser asked the company to fix tiles and polish them, the company does the job by giving the work to outside contractors. The actual work of fixation and polishing the tiles is done by the contractor's employees and it was claimed that the supervision and control over the work is done by the contractor and not by the company. No payment is directly made to the employees of the contractor. In the course of the cross examination it emerged that the company has no fixed contractor. During the course of the work the contractor is paid intermittently. The last payment is effected after the completion of the entire work. In the event that the work is not implemented according to order, a certain part of

the payment is deducted.

4 The E.S.I. Court in the course of its judgment has relied upon a judgment of a Learned Single Judge of this Court in E.S.I.C. v. Abu Marble Mining Pvt. Ltd. (1992 II CLR 881) wherein the Respondent was dealing in cutting, finishing and fixing marble at the work site and the work of fixing was done through a labour contractor. The Learned Single Judge held that the employees of the marble fixer, who was the immediate employer, would be the employees of the principal employer within the meaning of Section 2(9) of the E.S.I. Act, 1948. The impugned judgment was delivered on 12th October, 2004. The Learned Judge in the present case was perhaps not apprised with the fact that on 27th August, 2004 a Division Bench of this Court in Abu Marble Mining Pvt. Ltd. v. Regional Directors, ESI Corporation, Mumbai allowed the appeal against the judgment of the Learned Single Judge. The decision of the Division Bench was reported in 2005 I CLR 34. The Learned Trial Judge obviously did not have the benefit of the judgment of the Division Bench which has laid down the appropriate tests in that regard. In the present

case, there is a clear admission on the part of the Appellant that the work of the Appellant consists of manufacturing, fixing and polishing of cement tiles. On this aspect there can be no dispute in view of the specific statement contained in the examination- in- chief of the witness for the Appellant. However, under sub clause (ii) of Clause (9) of Section 2, the Court has to consider as to whether the person is employed under the supervision of the employer or his agent on work which is ordinarily a part of the work of a factory or establishment, or which is preliminary to the work carried on in or incidental thereto. In my view, the question as to whether there is an element of supervision or agency would merit fresh consideration by the Trial Court in the light of the judgment of the Division Bench which as noted earlier was not brought to the attention of the Trial Court. In order to facilitate a fresh determination the impugned order dated 12th October, 2004 is quashed and set aside. The E.S.I. Application 74 of 1987 shall stand restored to the file of the Insurance Court which shall dispose of the Application after furnishing an opportunity of being heard to the parties. The Appeal is disposed

of in the aforesaid terms. There shall be no order as to costs.

In view of the disposal of the First Appeal, the Civil Application is rendered infructuous and is accordingly disposed of.